In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 744

UNITED STATES OF AMERICA, APPELLANT

v.

INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM AND APPELLANT'S MOTION TO ADVANCE

ARGUMENT

The fundamental error in appellee's motion to affirm lies in the statement on page 11 that the holding of the District Court that this indictment fails to charge an offense under the statute is a far cry from a holding that "*no* political broadcast by a union can amount to an 'expenditure' under the statute." There is nothing on the face of this indictment which defines or limits the nature of the broadcasts charged. The in-

dictment alleges the expenditure of substantial sums of money out of general union funds to pay the expenses of broadcasts over a commercial television station "urging and endorsing" the selection and election of particular candidates. *Any* political broadcast by a union, to be political, must necessarily urge and endorse the selection or election of particular candidates. To the extent that this is so, *any* political broadcast under the auspices of a union does, in the words of the District Court, state the position of the union and would therefore not be covered by the statute. We can conceive of no union broadcast, no matter how aggressive the electioneering on behalf of particular candidates, which would not be within the scope of the District Court's ruling.

Conversely, there is nothing on the face of this indictment which does not permit the government to prove that the broadcasts here charged were out-and-out electioneering of the most flagrant type. For example, it would be entirely consistent with the allegations of this indictment if the proof showed that the union paid for a series of broadcasts which consisted only of the constant repetition of a slogan, such as "Vote for Mr. X, the union's friend." This would be a broadcast stating the union's position on a particular candidate and it would be, in the terms of the indictment, a broadcast "urging and endorsing" the election of a particular candidate. But it would also be

a very different type of broadcast and involve different considerations of constitutionality than would a broadcast reviewing the union's position on current issues affecting labor. Without endeavoring here to go into matters of constitutionality, we think it is enough to suggest that inasmuch as a labor union is an entity composed of many individuals, not necessarily of the same political persuasion, there can well be a difference in constitutional terms between a prohibition of general expressions of opinion which directly relate to the particular purposes for which the entity was organized, and expressions of political advocacy which have a more indirect bearing on the proper interests of the entity and amount to much greater participation in the active political campaign of a particular candidate. It is enough for present purposes to point out that the difference exists and that the District Court failed to note that the allegations of this indictment would cover the latter type of broadcast.

As we point out in our Statement as to Jurisdiction, in view of the admittedly great significance of television and radio broadcasts in present day campaigns, there can, we believe, be no doubt that a political broadcast on behalf of a particular candidate can amount to an indirect, almost a direct, contribution to his political campaign. The fact that the indictment does not charge a contribution is not significant. As this Court noted in *United States* v. *C. I. O.*, 335

U. S. 106, 116, the term "expenditure" was inserted in the statute because "contribution" had been narrowly interpreted in such a way that it "could easily be circumvented through indirect contributions." Our point is that political broadcasts can be the type of expenditures that, while not technically and formally contributions, amount to indirect contributions to the political campaign of a candidate, and that there is nothing in this indictment to show that the broadcasts here involved do not have that character.

Certainly, political broadcasts out of general funds *can* be an "expenditure" condemned by the statute. The difference between a general statement of position as part of the union's normal activities and special expenditures for out-and-out electioneering was noted by this Court in the *C. I. O.* decision (335 U. S. at pp. 122–123) when it said:

> It is one thing to say that trade or labor union periodicals published regularly for members, stockholders or purchasers are allowable under § 313 and quite another to say that in connection with an election occasional pamphlets or dodgers or free copies widely scattered are forbidden.

This Court thus recognized that there was a distinction, on the one hand, between general statements of position addressed primarily to the

union's own members, and, on the other hand, active electioneering addressed to the public at large.

This, in the field of written publications, is a distinction that can pertain, *mutatis mutandis,* to oral communications as well—a distinction between the normal avenues for expression of the opinion of the union to its own members on matters which directly concern the purposes for which it was organized, and the special use of funds contributed by all members, whatever their political persuasion, in support of the public political campaign of a particular candidate. Whether any particular broadcast falls on one side of this line or another is a question of fact to be determined on the basis of all the relevant evidence which must be developed at a trial and which cannot, and properly should not, be alleged in the indictment. See *United States* v. *Petrillo,* 332 U. S. 1, 11–12. Since the allegations of this indictment would permit proof of such active public electioneering by the union out of general funds, it was error to dismiss the indictment for failure on its face to state an offense.

It is, of course, true that any broadcast, even of the electioneering variety, does involve speech, and to the extent that such speech paid for out of general funds is prohibited, there will be issues under the First Amendment. This Court has, however, recognized that the policy of avoid-

ing constitutional issues cannot justify the complete rewriting of a statute which Congress has passed. "A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language employed by Congress might require a court to face a constitutional question." *United States* v. *Sullivan,* 332 U. S. 689, 693. As this Court there pointed out, the cases applying the principle of strict construction do not authorize "a court in interpreting a statute to depart from its clear meaning." And the Court went on (pp. 693–4):

> * * * When it is reasonably plain that Congress meant its Act to prohibit certain conduct, no one of the above references justifies a distortion of the congressional purpose, not even if the clearly correct purpose makes marked deviations from custom or leads inevitably to a holding of constitutional invalidity. Although criminal statutes must be so precise and unambiguous that the ordinary person can know how to avoid unlawful conduct, see *M. Kraus & Bros., Inc.,* v. *United States,* 327 U. S. 614, 621, 622, even in determining whether such statutes meet that test, they should be given their fair meaning in accord with the evident intent of Congress. *United States* v. *Raynor,* 302 U. S. 540, 552.

While, therefore, we recognize that the principle of avoiding constitutional issues must be taken into consideration, we do not believe that it can justify the interpretation, necessary to warrant dismissal of this indictment, that *no* political broadcast by a union endorsing particular candidates, paid for out of general funds, can ever amount to an "expenditure." At the least, the statute is reasonably interpreted as applying to the types of political broadcasts, paid for out of general funds, that represent special expenses for active electioneering on behalf of particular candidates. The point here is that, even on this narrow interpretation, the District Court was not justified in dismissing the instant indictment for failure to state an offense under the statute.[1]

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[1] For this reason, we fail to see why respondents think they derive assistance from the remarks of Assistant Attorney General Olney before a Congressional committee that the constitutional doubts expressed in the *C. I. O.* opinions rendered the statute ineffective. The *C. I. O.* decision admittedly left open avenues of union activity which at least some sponsors of the legislation intended to close. With those avenues open, and through the means of separate funds established by voluntary contributions, there is no doubt that labor unions have been able to engage in extensive political activity without violating the statute. This does not mean, and Mr. Olney did not suggest that, where a union chooses not to work within permissible limits, where it uses general rather than special funds for political expenses of the electioneering variety, no violation can occur. Rather, his testimony was to the effect that the approach of publicity might well be considered as another method of dealing with the problem.

In taking the view that at least certain political broadcasts by unions can amount to the type of indirect expenditure which the statute was designed to reach, we do not rely wholly on the specific legislative history dealing with broadcasts, although we do not think that it should be utterly disregarded. We recognize that by the decision in *United States* v. *C. I. O.*, this Court interpreted the statute less broadly than some of the proponents of the legislation may have conceived its coverage to be. Similarly, in both *United States* v. *Rumely*, 345 U. S. 41, and *United States* v. *Harriss*, 347 U. S. 612, this Court adopted a more restrictive interpretation of the term "lobbying" than statements on the floor of Congress indicated was within the minds of some of the legislators when they used that term. But to read the term "expenditure" as it must be read to uphold the decision of the District Court—so as to exclude from its coverage all political broadcasts by the union urging and endorsing particular candidates—is to give it an interpretation which deprives it of all substantial meaning and to disregard, not only statements as to particular applications of the words used, but the whole history and purpose of the statute. Respondents do not dispute that, as this Court noted in the *C. I. O.* case (335 U. S. at p. 116), the word "expenditure" was inserted to prevent the evasion of the prohibition against

"contributions" by expenditures which in practical realities amount to contributions to the campaign of a candidate. Political broadcasts urging and endorsing the election of a particular candidate can amount to an indirect contribution to his campaign. Since that may be proved under this charge, it was error to dismiss the indictment.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the motion to affirm should be denied and that probable jurisdiction should be noted.

In view of the importance of the question at this time, we respectfully request the Court to advance the cause for argument and decision at this term.

Respectfully submitted,

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